STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Public Telecommunications Association, an Illinois not for profit corporation	)	
	)	Docket No. 15-0254
Petition to determine whether Illinois local exchange carriers are in compliance with the Illinois Public Utilities Act and Section 276 of the Communications Act of 1934.	)	

AT&T ILLINOIS' MOTION TO DISMISS PETITION

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Pursuant to 83 Ill. Adm. Code § 200.150, Illinois Bell Telephone Company d/b/a AT&T Illinois d/b/a AT&T Wholesale ("AT&T Illinois") moves to dismiss the Petition filed by the Illinois Public Telecommunications Association ("IPTA"), which asks the Commission to require AT&T Illinois to pay refunds to IPTA members on payphone rates from 1997 to 2003, based on the argument that AT&T Illinois' rates during that period did not comply with federal law. The Petition should be dismissed for multiple reasons.

The primary problem with the IPTA's refund claim is that the IPTA has already litigated it – and lost it – before this Commission,[1] the Illinois Court of Appeals,[2] the FCC,[3] and the D.C. Circuit,[4] and exhausted all appeals of those decisions.[5] All told, the IPTA has raised the same refund claim *eleven* times in *six* forums, and lost every time. Multiple legal doctrines prohibit the IPTA's bid for a twelfth bite at the apple. Courts have developed these doctrines to bring finality to disputes once they are decided and prevent such endless relitigation of the same claim. These include res judicata, collateral estoppel, the law of the case, and the prohibition on collateral attacks on final orders. Each of these doctrines, and other law, bars the Petition here, and it should be dismissed and the docket terminated.

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[1] Interim Order, *Investigation Into Certain Payphone Issues as Directed in Docket 97-0225*, Ill. C.C. Dkt. No. 98-0195, 2003 Ill. PUC LEXIS 912, *104-*108 (Nov. 12, 2003) ("*98-0195 Order*") (Att. 1 hereto).

[2] *Illinois Public Telecommunications Assn. v. Illinois Commerce Comm.*, No. 1-04-0225, Order at 6-10 (Ill. App. 1st Dist., Nov. 23, 2005) ("*Illinois Appeal Decision*") (Att. 3 hereto).

[3] Declaratory Ruling and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 28 FCC Rcd. 2615, ¶ 41 (rel. Feb. 27, 2013) ("*FCC Declaratory Ruling*") (Att. 8 hereto).

[4] *Illinois Public Telecommunications Assn. v. FCC*, 752 F.3d 1018, 1022-25 (D.C. Cir. 2014) (Att. 9 hereto).

[5] *See* Atts. 2, 4-7, and 10-11 hereto.

BACKGROUND

A. Section 276 and Payphone Rates

Section 276 of the federal Telecommunications Act of 1996 ("1996 Act") bars a Bell Operating Company ("BOC") from discriminating in favor of its affiliated payphone service. 47 U.S.C. § 276(a)(2). As part of implementing Section 276, the FCC adopted a pricing standard – known as the "New Services Test" (or "NST")[6] – to govern the rates that BOCs charge unaffiliated payphone service providers ("PSPs") for the telephone lines that the PSPs use to connect to the local network. But the FCC did not apply the New Services Test itself. Rather, it elected to "rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276."[7] The FCC thus preserved states' authority to regulate basic payphone line tariffs, while requiring them to apply a federal pricing standard in reviewing those rates.

B. Illinois Decisions Rejecting Refunds

In May of 1997, about a year after Section 276 took effect, the IPTA filed a petition asking the Commission to determine whether AT&T Illinois' payphone rates complied with the New Services Test and, if not, to award refunds to the IPTA's members for the period between April 1997 and whenever new rates took effect. *98-0195 Order*, 2003 Ill. PUC LEXIS 912, *93-*94. That was Docket 97-0225. In December of 1997, the Commission instead decided to open its own investigation into payphone rates. This became Docket 98-0195.

After an extensive proceeding, the Commission ruled in November of 2003 that AT&T Illinois' rates did not comply with the New Services Test and should be reduced going forward.

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[6] Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd. 20541 (1996) ("*First Payphone Order"*).

[7] Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd. 21233 (1996) ("*Payphone Reconsideration Order"*).

The Commission also held, however, that the filed rate doctrine and the rule against retroactive ratemaking barred any refunds to the IPTA for the difference between the new rates and the rates that had been in place from 1997 to 2003. Relying on the U.S. Supreme Court's decision in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932) and the Illinois Supreme Court's decisions in *Independent Voters of Illinois v. Illinois Commerce Comm.*, 117 Ill.2d 90 (1987) and *Mandel Bros., Inc. v. Chicago Tunnel & Terminal Co.*, 2 Ill.2d 205 (1954), the Commission found that (i) it had previously approved AT&T Illinois' payphone rates at least twice, (ii) "[a]n approved rate 'cannot be held to be excessive,'" and, therefore, (iii) granting refunds "would be directly contrary to the statutory requirement that a carrier charge only its tariffed rates." *98-0195 Order*, 2003 Ill. PUC LEXIS 912, at *104, citing *Independent Voters*, 117 Ill.2d at 97 and *Mandel Bros.*, 2 Ill.2d at 209. Thus, the Commission held, "there is no legal basis for ordering a refund" and doing so "would necessarily be contrary to Illinois law and the Supreme Court's holding in *Arizona Grocery*." *Id*. at *107. The Commission also denied rehearing. Att. 2.

The IPTA appealed the Commission's decision, again arguing that it was entitled to refunds for the period between 1997 and 2003. *Illinois Appeal Decision* at 1, 8. The Court of Appeals rejected that argument, agreeing with the Commission that the filed rate doctrine and the rule against retroactive ratemaking barred any refunds. As the Court explained, the Commission had previously approved AT&T Illinois' payphone rates (*id*. at 3), meaning AT&T Illinois was both legally entitled and legally obligated to charge only those rates from 1997 to 2003, and the federal and state Supreme Court decisions in *Arizona Grocery* and *Mandel Bros.* therefore prohibited refunds from those rates. *Id*. at 6-8. The Court rejected the IPTA's view that Section 276 required refunds, finding that federal law left refund issues to the states. *Id*. at 8-9.

The IPTA asked the Court to reconsider, vacate, or stay that decision and refer the issues to the FCC, but the Court denied that request. Att. 4. The IPTA then asked the Illinois Supreme Court to review the Court of Appeals' decision, but the court denied the IPTA's request. Att. 6. The IPTA then asked the U.S. Supreme Court to take the case, but it too refused. Att. 7.

C. Federal Decisions Upholding Denial of Refunds

That should have been the end of the matter. While the state appellate process was proceeding, however, the IPTA pursued a parallel challenge to the Commission's *98-0195 Order* by filing a petition for declaratory ruling at the FCC. The IPTA asked the FCC to preempt the Commission's decision and hold that Section 276 and the FCC's orders make refunds mandatory. Payphone associations from other states that denied refunds filed similar petitions.

The FCC denied the IPTA's and other state associations' requests, holding that Section 276 does not mandate refunds simply because a rate exceeds the level allowed by the New Services Test. *FCC Declaratory Ruling*, ¶ 41. Rather, the issue of whether to order refunds was left to the states, which are free to deny refunds if they so choose:

> [W]e reject the [payphone providers'] arguments that section 276 provides them with an absolute right to refunds in the cases before us. Although section 276 establishes requirements for payphone rates, it does not dictate whether refunds are due under any given set of circumstances. . . . [I]n deciding whether to award refunds, the state commissions properly looked to applicable state and federal law and regulations, and decided, for reasons specific to each state's analysis, not to order refunds. In Illinois, the ICC based its rejection of refunds on the Illinois filed tariff doctrine and the IPTA's failure to file a formal complaint. . . . *Although these decisions deny refunds in situations where a BOC's rates were not NST-compliant by April 15, 1997, they are not inconsistent with the Commission's orders and regulations implementing section 276 of the Act*.

Id. (emphasis added).

The IPTA appealed to the D.C. Circuit, arguing that the FCC's refusal to override the states and require refunds violated Section 276, and that the filed rate doctrine could not bar refunds. *IPTA v. FCC*, 752 F.3d at 1022. The court rejected the IPTA's arguments, finding that "a state commission or state court decision that considers a Section 276 claim and denies refunds – as happened in the three states at issue here – is not inconsistent with the FCC's regulations and is not preempted." *Id*. at 1024. The court also noted that the filed rate doctrine and the prohibition on retroactively changing approved rates by ordering refunds are longstanding tenets of telecommunications law, "so it hardly seems unreasonable or arbitrary for the FCC to allow states" to deny refunds based on those principles. *Id*. at 1025. The IPTA moved for rehearing and rehearing *en banc* of that decision, but the D.C. Circuit refused. Atts. 9-10. The U.S. Supreme Court then rejected the IPTA's petition for certiorari. Att. 11.

D. The IPTA's Petition Here

Ten years after the Illinois Court of Appeals' decision upholding the Commission and denying the IPTA's refund request, and more than two years after the FCC decision upholding the Commission and denying the IPTA's refund request, the IPTA filed its Petition here, seeking the very same refunds on the very same theory. The IPTA appears to believe that losing the issue at the FCC and D.C. Circuit somehow changed the law in its favor.

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED FOR PROCEDURAL DEFECTS

It is unclear what the "Petition" is supposed to be as a procedural matter, for it cites provisions related both to complaints (220 ILCS 5/10-108) and to motions to reopen (83 Ill. Adm. Code § 200.900), yet is not captioned as a complaint or a motion to reopen. In any event, the IPTA has not met the procedural requirements for either path. If intended to be a motion to reopen, the Petition is procedurally defective because it was not filed in Docket 98-0195 and was

not served on all the parties to that docket (including AT&T Illinois), as required by 83 Ill. Adm. Code § 200.150(b) and 200.190(c). If intended to be a Complaint, the IPTA's Petition is procedurally defective because AT&T Illinois is not named as a respondent, the Petition does not include AT&T Illinois' name and address, and the Commission has not served the pleading on AT&T Illinois (and neither has the IPTA), as required by 220 ILCS 5/10-108 and 83 Ill. Adm. Code § 200.170(a) and (b). These defects alone justify dismissing the Petition. More importantly, however, the Petition must be dismissed even if the IPTA cured these defects.

II. THE IPTA HAS ALREADY LOST THE REFUND ISSUE AT THE COMMISSION, IN STATE COURT, AND IN FEDERAL COURT, AND CANNOT RAISE IT AGAIN HERE

The Commission, the Court of Appeals, the FCC, and the D.C. Circuit rejected the IPTA's theory that Section 276 and the FCC's payphone orders require refunds, yet the IPTA now wants the Commission to reach a different result. Several legal doctrines bar that request.

A. The IPTA's Claim Is Barred by Res Judicata and Collateral Estoppel

Res judicata precludes a party from relitigating a judgment rendered by a court involving the same parties and same cause of action. *Hayes v. State Teacher Certification Bd.*, 399 Ill. App. 3d 1153, 1161-62, 835 N.E.2d 146 (5th Dist. 2005). Collateral estoppel bars relitigation of facts or issues decided against a party or its privies in a prior court decision. *Metro Util. Co. v. Illinois Commerce Comm.*, 266 Ill. App. 3d 266, 270, 634 N.E.2d 377 (2d Dist. 1994). These doctrines serve the goal of "promoting judicial economy and preventing repetitive litigation[.]" *Hayes*, 399 Ill. App. 3d at 1161.

Both res judicata and collateral estoppel apply here. The IPTA's refund claim involves the same parties, same issue, same facts, and same law as in all the proceedings discussed above, where the Court of Appeals and the D.C. Circuit rejected it. These court decisions "constitute[] an absolute bar to a subsequent action involving the same claim, demand or cause of action."

Nowak v. St. Rita High School, 197 Ill.2d 381, 389, 757 N.E.2d 471 (2001); *Blair v. Bartelmay*, 151 Ill. App. 3d 17, 20, 502 N.E.2d 859 (3d Dist. 1986) ("Collateral estoppel also operates as an absolute bar in a subsequent action where the same parties or their privies attempt to relitigate identical issues necessarily decided by a court of competent jurisdiction in a prior cause of action."). Res judicata and collateral estoppel therefore prohibit the IPTA from seeking to relitigate its refund claim and undo those prior decisions. *See People v. Illinois Commerce Comm.*, 2012 IL App (2d) 100024, ¶¶ 23-29, 967 N.E.2d 863 (2d Dist. 2012) (collateral estoppel barred ComEd and the Commission from rearguing an issue that had previously been decided); *Commonwealth Edison Co. v. Illinois Commerce Comm.*, 2014 IL App (1st) 130302, ¶¶ 53-55, 16 N.E.3d 713 (1st Dist. 2014) (same).

B. The Law of the Case Doctrine Bars the IPTA's Claim

The law of the case doctrine provides that when a reviewing court decides a question of law, its decision is binding on the parties, the reviewing court, and the lower court or agency in any further proceedings in the case. *People v. ICC*, ¶¶ 31-32, 967 N.E.2d at 870 ("The law-of-the-case doctrine provides that questions of law decided on a previous appeal are binding on the trial court on remand as well as on the appellate court on a subsequent appeal."). Accordingly, "[c]ourts will not permit parties to relitigate the merits of an issue once decided by an appellate court[.]" *Turner v. Commonwealth Edison Co.*, 63 Ill. App. 3d 693, 698, 380 N.E.2d 577 (5th Dist. 1978). The purpose of the doctrine "is to protect settled expectations of the parties, ensure uniformity of decisions, maintain consistency during the course of a single case, effect proper administration of justice, and bring litigation to an end." *People v. ICC*, ¶ 34, 967 N.E.2d at 871.

The issue raised by the Petition – whether IPTA members are entitled to refunds on payphone rates for the period from 1997 to 2003 – was litigated and decided in the Court of Appeals' decision affirming the *98-0195 Order*. The Court of Appeals held, as a matter of law,

that the IPTA was not entitled to refunds. That ruling is final and non-appealable, and is the binding law of the case. The law of the case doctrine therefore prohibits the IPTA from trying to obtain a different result (or the Commission from reaching a different result) by revisiting the proceeding. *Independent Voters of Illinois v. Illinois Commerce Comm.*, 189 Ill. App. 3d 761, 767, 545 N.E.2d 557 (1989) ("The judgment of a reviewing court is final upon all questions decided[.]"); *People v. ICC*, ¶ 34, 967 N.E.2d at 871 ("the law-of-the-case doctrine binds ComEd and the Commission on the questions of law [previously] decided," so neither one could argue for a different result later in the case). Moreover, all of the policy bases behind the law of the case doctrine apply here, for applying that doctrine to dismiss the IPTA's Petition will protect the parties' expectations, maintain consistency, and at last bring an end to the IPTA's ceaseless relitigation of the same issue.[8] *See People v. ICC*, ¶ 32, 967 N.E.2d at 870.

C. The IPTA's Claim Is an Improper Collateral Attack on a Final Order

The Petition also is barred because it is an improper collateral attack on the *98-0195 Order* and the *Illinois Appeal Decision*. As the Illinois Supreme Court has explained:

> [A] judgment rendered by a court having jurisdiction of the parties and the subject matter is not open to attack in any collateral action except for fraud in its procurement, and even if the judgment is so illegal or defective that it would be set aside or annulled on a proper direct application, it is not subject to collateral impeachment so long as it stands unreversed and in force.

Illini Coach Co. v. Illinois Commerce Comm., 408 Ill. 104, 111-14, 96 N.E.2d 518 (1951) (party could not file a complaint that collaterally attacked a final Commission order); *Peoples Gas, Light and Coke Co. v. Buckles*, 24 Ill.2d 520, 528, 182 N.E.2d 169 (1962) (party could not collaterally attack Commission order via state-court lawsuit); *Albin v. Illinois Commerce Comm.*,

[8] *People v. ICC* noted "two recognized exceptions" to the law of the case doctrine for when (i) a higher reviewing court reverses the lower court or (ii) the reviewing court itself finds that its decision was palpably erroneous. *People v. ICC*, ¶ 35, 967 N.E.2d at 871. Neither applies here, as all higher courts denied review of the Court of Appeals' decision, and the Court of Appeals has not held that its prior decision was erroneous.

87 Ill. App. 3d 434, 436-38, 408 N.E.2d 1145 (4th Dist. 1980) (Commission order in prior case "still stands, unreversed and unmodified," and was not subject to collateral attack in later case).

The Commission has prevented collateral attacks by dismissing cases at the outset. For example, in *Cbeyond Commc'ns v. Illinois Bell Tel. Co.*, Ill. C.C. Dkt. No. 11-0696, 2013 WL 1701621, at *8-*9 (Mar. 27, 2013), the Commission granted AT&T Illinois' motion to dismiss Cbeyond's Complaint, finding that Cbeyond's claim was an impermissible collateral attack on a prior Commission order because Cbeyond sought to relitigate points that necessarily were decided in the prior proceeding. Similarly, in *City of Chicago v. Commonwealth Edison Co.*, Ill. C.C. Dkt. No. 96-0360, 1997 WL 33771836 (May 7, 1997), the Commission granted ComEd's motion to dismiss the City of Chicago's complaint, finding that the complaint was "a clear attack on previous decisions made by this Commission," in that it raised issues the City itself had raised (and lost) in ComEd's prior rate case, and that "[a]lmost every point raised in the [City's] complaint . . . has been decided in other dockets." *Id*. The Commission also dismissed a series of complaints in 1994 and 1995 as constituting collateral attacks on final Commission orders.[9]

Illini Coach and other decisions recognize that the only path for challenging a Commission order is rehearing and direct appeal, not a collateral attack. The IPTA has had (and used) every chance to challenge the *98-0195 Order* and the *Illinois Appeal Decision* through the avenues allowed by Illinois law and the Public Utilities Act (and through the federal system as well). It cannot now seek to reverse those decisions by collateral attack.

[9] *Citizens for a Better Environment v. West Suburban Recycling and Energy Center*, Ill. C.C. Dkt. No. 94-0360, 1995 WL 17200502 (Jan. 25, 1995); *Citizens for a Better Environment v. Robbins Resource Recovery Co.*, Ill. C.C. Dkt. No. 94-0361, 1995 WL 16778269 (Dec. 21, 1994); *Citizens for a Better Environment v. Chewton Glen Energy, Inc.*, Ill. C.C. Dkt. No. 94-0362, 1995 WL 17200503 (Feb. 23, 1995); *Citizens for a Better Environment v. Illinois Wood Energy Partners, L.P.*, Ill. C.C. Dkt. No. 94-0363, 1995 WL 17200504 (Apr. 12, 1995).

III. THE IPTA'S CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS

The Petition also must be dismissed because even if it stated a new claim – rather than a claim that has already been litigated and decided – any such claim is time-barred. The IPTA's claim is based on an alleged violation of federal law, namely Section 276 of the 1996 Act and the FCC's New Services Test. Petition at 1 and ¶ 21 (seeking refund to the extent that AT&T Illinois' rates "exceeded the cost based rate requirements of Section 276"). The limitations period on a claim seeking refunds because rates allegedly violate federal law is two years. 47 U.S.C. § 415(b); *Davel Commc'ns, Inc. v. FCC*, 460 F.3d 1075, 1091 (9th Cir. 2006) (claim for refunds based on theory that payphone rates did not comply with the New Services Test was subject to Section 415(b)'s two-year limitations period). Such a claim accrues when the carrier is injured or should have discovered it has been injured. *Communications Vending Corp. of Arizona v. FCC*, 365 F.3d 1064, 1073 (D.C. Cir. 2004). The IPTA's claim regarding AT&T Illinois' rates therefore accrued, at the absolute latest, on November 12, 2003, when the Commission issued the Order in Docket 98-0195 finding that AT&T Illinois' prior payphone rates did not satisfy Section 276.[10] December 2003 is far more than two years ago.[11]

IV. EVEN IF DOCTRINES OF FINALITY DID NOT BAR THE PETITION – WHICH THEY DO – THE IPTA COULD NOT MEET THE STANDARD FOR REOPENING DOCKET 98-0195

The legal doctrines discussed above prohibit the IPTA from seeking to relitigate the refund issue it has lost eleven times and prohibit the Commission from retroactively overturning

[10] In truth the IPTA's claim accrued even earlier, because it was on "inquiry notice" that AT&T Illinois' payphone rates might be deemed too high under Section 276, but there is no need to address that point at this time, because the Petition is so untimely even if a later accrual date were used. *See Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1091-92 (9th Cir. 2006). Indeed, the Petition would be time-barred even if the IPTA's claim did not accrue until the *FCC Declaratory Ruling*, because that order was released on February 27, 2013, more than two years before the IPTA filed its Petition on April 1, 2015.

[11] The IPTA's Petition does not identify any state-law basis for its claim, so the federal limitations period governs. Even if the IPTA had listed a state-law basis for its claim, however, its request for refunds based on allegedly excessive charges would be barred by the two-year limitations period in 220 ILCS 5/9-252.

the prior decisions, for both the IPTA and the Commission are bound by those decisions. Of course, even if those legal barriers did not exist and the Commission could lawfully consider the IPTA's Petition as a motion to reopen Docket 98-0195, the IPTA could not meet the standard for reopening. The Commission's rules allow reopening only when "conditions of fact or law have so changed as to require, or the public interest requires, such a reopening." 83 Ill. Adm. Code § 200.900. None of these prerequisites exist here.

A. There Has Been No Change in the Facts

IPTA does not claim there has been any change in the relevant facts or discovery of new facts, nor could it. The IPTA seeks refunds for 1997-2003, and the relevant facts during that time period obviously have not changed (and could not change without a time machine).

B. There Has Been No Change in Law

Given that it claims no change in facts, the IPTA's theory appears to be that the *FCC Declaratory Ruling* changed the law. Specifically, at the May 11 prehearing conference, the IPTA said that its argument hinges on paragraph 47 and footnote 161 of the *FCC Declaratory Ruling*, which the IPTA claims provide new "guidance" that the Commission did not consider before. Petition, ¶¶ 17-21; 5/11/2015 Tr. at 20, 22. That is incorrect.

The IPTA appears to rely on this language in paragraph 47:

> The states that are involved in the pending petitions are at various points in the procedural processes. Although they concluded, based upon the facts of the particular proceedings and the relevant law, that refunds were not required, states in these and other proceedings may well find that refunds are appropriate.

That language has no bearing here, because the "procedural process" in Illinois is complete and the decisions of the Commission and Court of Appeals are final, non-appealable, and binding. Moreover, the Commission and Court of Appeals did not merely hold that refunds "were not required"; rather, they held that requiring refunds would "be contrary to Illinois law" and

"contrary to the statutory requirement that a carrier charge only its tariffed rates." *98-0195 Order*, 2003 Ill. PUC LEXIS at *104, *107; *Illinois Appeal Decision* at 9. And the FCC and D.C. Circuit both held that those decisions were lawful. As the FCC explained, "[n]othing in the record here persuades us that the state commissions [that denied refunds] misapplied federal or state law or regulations, or established requirements that are inconsistent with the Commission's regulations." *Id*., ¶ 40.[12] The D.C. Circuit likewise held that denying refunds was "not inconsistent with" federal law and that it was not unreasonable to deny refunds based on the filed rate doctrine and rule against retroactive ratemaking, which are "central tenet[s] of telecommunications law." *IPTA v. FCC*, 752 F.3d at 1024-25.

In addition, the law that the Commission and Court of Appeals relied on in denying refunds came from the U.S. Supreme Court decision in *Arizona Grocery* and Illinois Supreme Court decisions in *Independent Voters* and *Mandel Bros (*Att. 1 at *104-*108; Att. 3 at 6-10), and the FCC did not reverse those decisions and the law they established, or prohibit states from applying them. Nor did the FCC say that state commissions can ignore state-law doctrines like res judicata, collateral estoppel, law of the case, and the bar against collateral attacks.[13]

Indeed, the only "guidance" in paragraph 47 and footnote 161 is that decisions on refund requests are left to the states. That is nothing new, for the Commission and Court of Appeals clearly understood that to be the law when making their decisions in 2003 and 2005. Furthermore, the D.C. Circuit expressly rejected the IPTA's argument that the language in

[12] *Accord*, *FCC Declaratory Ruling*, ¶ 1 ("the state commissions' decisions [that denied refunds] were not inconsistent with the Commission's regulations"), ¶ 37 (state decisions denying refunds "are not inconsistent with the Commission's regulations"), ¶ 41(state decisions denying refunds "are not inconsistent with the Commission's orders and regulations implementing section 276"), ¶ 42 (state decisions denying refunds are "not inconsistent with the statute and the approach the Commission formulated in the *Payphone Reconsideration Order*").

[13] Of course, even if the *FCC Declaratory Ruling* had changed the law it would not matter here, because such a change could only apply prospectively, and the IPTA does not seek any prospective relief. *E.g.*, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988).

paragraph 47 stating that state commissions "may" order refunds means that "any state decision denying refunds" is unlawful. *IPTA v. FCC*, 752 F.3d at 1024. As the court explained, "the fact that states *may* order refunds does not mean that states *must* order refunds. Therefore, a state commission or a state court decision that considers a Section 276 claim and denies refunds – as happened in the three states at issue here [including Illinois] – is not inconsistent with the FCC's regulations and not preempted." *Id.* (emphasis in original).

The IPTA also claims that two federal circuit courts of appeal have held that "the filed rate doctrine cannot bar" refunds on payphone rates. Petition, ¶ 21. That is wrong, and would be irrelevant even if it were true. The IPTA presumably is referring to decisions from the Ninth and Tenth Circuits[14] that it cited to the D.C. Circuit and in its petition for certiorari of the D.C. Circuit's decision. Those decisions are irrelevant because Illinois is not in the Ninth or Tenth Circuit, and in any event the decisions that the Commission and Court of Appeals relied on here come from the U.S. and Illinois Supreme Courts. Moreover, the D.C. Circuit obviously did not view the Ninth and Tenth Circuit decisions as persuasive, for it affirmed the FCC's decision. Likewise, the U.S. Supreme Court denied the IPTA's petition for certiorari despite its claim that these decisions created a split among the circuits.[15]

C. The Public Interest Does Not Support Reopening

There also is no public-interest basis for reopening Docket 98-0195. To the contrary, reopening the docket would be against the public interest. The law of the case doctrine, the doctrine barring collateral attacks on final orders, and res judicata and collateral estoppel are designed to promote and protect the public interest by allowing reliance on final decisions.

[14] These are *Davel*, 460 F.3d 1075 and *TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225 (10th Cir. 2007).

[15] In addition, in the cases the IPTA relies on it appears that Qwest had not filed the required tariffs and cost support at all. As explained in *TON Services*, "TON's central challenge involves Qwest's procedural compliance with FCC orders and regulations [requiring tariffs to be filed] rather than a challenge to the reasonableness of Qwest's rates." 493 F.3d at 1237, citing *Davel*, 460 F.3d at 108.

People v. ICC, ¶ 34, 967 N.E.2d at 871; *Hayes*, 399 Ill. App. 3d at 1161. Reopening Docket 98-0195 when there has been no change in law or fact would undercut those purposes. There is no public interest in forcing parties to keep relitigating issues decided long ago. *See, e.g.*, *Malry v. Peoples Gas Light and Coke Co.*, Ill. C.C. Dkt. No. 05-0793, 2007 WL 1373755 (Jan. 24, 2007) (Commission has authority to "protect the public, including the parties that come before it, from the actions of those who would abuse its processes with less than well-intentioned and meritorious complaint filings and good-faith prosecution.").

CONCLUSION

The IPTA's Petition should be dismissed and this docket should be terminated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby states that he caused copies of the foregoing document to be served electronically on the following persons on June 1, 2015.

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